# SECURITY IN SHIPPING FINANCE

Charterparty as a security

Candidate: Traiporn Leelakun

Supervisor: Morten Kjelland, Dr. Juris

Deadline for submission: 09/01/2009

Number of words: 17,987

01.09.2009

UNIVERSITY OF OSLO

Faculty of Law

## Preface

In addition to the mortgage of the ship as a security in shipping finance, *charterparty* has increasingly developed its role as one of the important securities which the creditor will commonly take it as a supplemental security to secure the sum of loan granted to the shipowner. The charterparty is considered as a major source of income of the shipowner which will generate the cash flow to sustain the business. The law governing the assignment of charterparty as a security varies from country to country therefore the perfection or requirement in order to acquire the legal protection and the rights given to the assignee are subsequently different. The choice of law to govern the assignment of charterparty may create a difficulty when the enforcement is brought to a court of the country other than the country of governing law. This thesis illustrates the different of the law governing the assignment of charterparty by giving the comparison between Norwegian and English laws. Moreover, the thesis points out the possibility of the application of a foreign law as well as suggest a possible guideline in order to avoid the unexpected difficulty through the attempts of the international organizations.

During the preparation of the thesis, the availability of the sources of Norwegian law, either literatures or cases, in English are very limited. Therefore, the analysis from limited sources in this thesis may not be as precise as I expected. However, the analysis should provide the reader sufficient synopsis of the Norwegian law with respect to the assignment of charterparty and the choice of law matters. I always welcome any comments for the improvement in the future.

It would be incomplete without giving my gratitude to, first and foremost, my supervisor, *Morten Kjelland* for his great support and advice, *Hans Jacob Bull* and *Thor Falkanger* for the valuable guidance. I am also grateful to *Wilhelm Damm* and *Camilla Skøie Mørkve* of SCHJØDT, Oslo, for a great opportunity to have the valuable conversation, *Fredrik*

*Lindblom* of Advokatfirma DLA Piper Norway DA and *Richard Sjøqvist* of BUGGE, ARENTZ-HANSEN & RASMUSSEN, Oslo, for the excellent suggestion of this interesting topic and precious advice, *Bjørn P. Flaate* and *Geir Nedrelo* of Scandinavia, Energy, Commodities & Transportation, FORTIS, Oslo, for the practical information with respect to the assignment of charterparty in professional practice and my friends, *Supunnee Sookboonya* and *Kim Boman* for establishing the worthy connection. Last but not least, I would like to thank my family and all of my friends who always support me.

Traiporn Leelakun
Oslo, 27 August 2009

# Content

# 1 Introduction

In general, in order to sustain or expand the business, the business operator or owner will normally seek the fund to finance the business operation. There are several methods to obtain the finance to the business which may be either from the investor or in the form of loan from the bank, financier or creditor, herein after called the "*creditor*". The creditor will advance a large sum of money to the business operator; in this case will be referred as the "*borrower*". Nonetheless, in exchange for granting the loan, the creditor will require security to ensure that it will be sufficient to the value of full amount or at least majority portion of the loan in order to be covered and secured in case that the borrower fails to repay the debt or is in the event of default. The creditor intends to protect himself against the insolvency of the borrower and to ensure his priority over the claims of other creditors against the borrower. Especially, in this current economic and financial crisis prompts the creditor to be more cautious and strict thus the creditor will seek the security from the borrower in every possible way in order to protect his loss from the default of repayment by the borrower.

## 1.1 Structure of thesis

As we have seen a great expansion in the world merchant fleet over the years, the shipping industry has been considerably growing and changing. The development of shipping industry can reflect from, for instance, the demand of the shipping service, the increase of the ship size and the accelerated technological development of the modern ship to make the ship more sophisticated and efficient. As a result, these circumstances have contributed to make the shipping finance more complicated and difficult. To build a new ship, buy a second had ship, repair, alter or convert the ship in order to respond to the demand of the shipping industry, has increased the necessity of the shipowner to raise the fund to finance his business which it has been greater than before. The shipowner will need to seek a financial support from the investor, bank or other lender who can grant the loan or advance

a large sum of fund to support him. According to general principle, there is no exception for shipping finance. The creditor also requires security in order to secure and protect his loss if the debt is in the event of default. The event of default includes, for example, the shipowner, fail to repay the debt, is in breach of the contract, becomes bankruptcy or insolvency, or the ship becomes total loss, is sold or attached another encumbrance without the consent of the creditor and so on. There are several forms of the security required by the creditor in shipping finance. The overview of the standard security in shipping finance will be discussed further in Chapter 2.

In this thesis, it will be emphasized on one of the standard securities in shipping finance which is "*Charterparty*". Basically, the ship itself is required to be as a major and most important security for the loan in shipping finance because the ship is economically high in value. However, the loan amount is usually greater than the value of the ship and, moreover, after a certain period since it has been operated; the ship will suffer from its ordinary wear and tear or other damages from its usage. The value of the ship will be depreciated and not sufficiently worth to cover the sum of the loan. Consequently, the creditor seeks for other assets or sources of income of the shipowner to subside this potential loss. It is common in the shipping industry that the shipowner will let the other party to operate the ship or as it is called "*charter*" and in return, the shipowner will receive remuneration in the form of either freight or hire from the charterer. Therefore, the charterparty is one of the most important sources of income for the shipowner which the creditor will practically requires as a security in shipping finance.

In practice, the creditor normally requires the shipowner to assign his right over the charterparty as a security. There are two common types of the assignment of the charterparty; *1) the assignment of all earnings* and *2) the assignment of all rights*. In many cases, the assignment of earnings may not be sufficient; the creditor may needs some additional rights. In reality, the law of each country governing the assignment of charterparty is not identical and vary from country to country; therefore, it may provide a different effect. The choice of law to govern the assignment, hence, is significantly

important and the creditor will select wisely with the purpose of protecting his beneficial advantage.

Shipping finance is a genuine international business which concerning several countries in each transaction. In this case, there are three parties involve; the creditor, the shipowner and the charterer. The loan agreement between the creditor and the shipowner may be governed by, for example, the law of country A and the charterparty between the shipowner and the charterer may be governed by the law of country B. It should be noted that the assignment is a collateral agreement as a security to the loan agreement which the borrower agrees to assign his rights in order to secure the repayment of the loan. The questions may arise whether it is possible to select another law differently from the law governing the loan agreement or the charterparty, for instance the law of country C to govern the assignment and whether there is any conflict of law among those agreements. The most practical question is *what extent the creditor can select the governing law for the assignment of the charterparty and what its subsequent effect is*. Since the law governing this matter, as mentioned above, vary from country to country, this thesis will describe the result and extent of the assignment of the charterparty by giving the comparison of the law of following countries; England as the English law is most extensively applied in the shipping industry and shipping finance in the world and Norway as one of the most important maritime centre in Scandinavia and the world. The detail of charterparty as a security will be discussed further in Chapter 3.

The creditor intends to protect his benefit as much as possible, thus the law of a country which provides more advantageous benefit for him, will be selected to govern the assignment. As the international character of shipping industry, one transaction can be involved with several countries. This can create the complexity of legal systems and the difference of jurisdictions. When the law governing the assignment of charterparty has been selected, the subsequent question shall arise *whether a foreign law can be applicable in the court of another country other than the country of the selected law*. Therefore, the matter of choice of law will also be discussed in this thesis by presenting the validity of the

assignment of charterparty, the factors in the consideration to select the law to govern the assignment and the possibility of the applicability of a foreign law in the court of another country. Furthermore, there are also the attempts by the international organization namely United Nations and European Union to establish the uniformity of the assignment of rights and receivables and the solution of the conflict of law which can be applied either directly or indirectly. The details of the choice of law will be discussed further in Chapter 4.

## 1.2 Legal sources

The assignment of charterparty is usually governed by legislation in relation to an assignment of rights, in particular, as a security which will differ in each country either the perfection of the assignment or rights acquired by the assignee. Since this thesis will illustrate the law of two legal systems; Norway and England, the law governing the assignment of those countries will be discussed. In Norway, *"The Mortgage Act ("Lov om pant") of 8 February 1980 (N0.2)"*, in particular, chapter 4 of the Act *"Contractual lien on securities, non-negotiable money claims etc"* is the main legislation to govern the assignment. In England, the main legislation is *"The Law of Property Act 1925"*, in particular, Section 136. Furthermore, with regard to the conflict of law problem in the law governing the assignment of charterparty, will refer to the two important conventions; *"The Rome Convention on the Law Applicable to Contractual Obligations 1980"* and *"United Nations Convention on the Assignment of Receivables in International Trade, United Nations, 2001"*, which provides the legal guideline not only to a signatory states but also influences indirectly to non-signatory states in order to solve the conflict of law in the assignment of rights, in particular receivables, issue. However, the latter Convention has not yet entered into force but it can be used as a guideline in order to avoid an unexpected problem, especially, the conflict of law. It should be noted that, even though, the attempt of these Conventions to create the uniformity, the domestic law in relation to the assignment of receivables, which is mandatory, is still significantly important and may prevail or limit the Conventions to be fully applicable. Therefore, there is no genuine uniformity on this matter at this point.

## 2 Overview of Standard Securities in Shipping Finance

With the purpose to reduce the credit risk and establish the priority over the claims of other creditors in the case of the insolvency or bankruptcy of the shipowner, for fear that the assets of the shipowner are insufficient to satisfy all claims, the creditor shall take the security for their advance and to ensure that their loan shall be repaid in total or at least, partially. However, in some circumstances, the secured creditor may not always has priority over the unsecured creditor; for example,

> "…in a winding up preferential creditors have priority over a floating charge, while the secured claims of directors of a company may in certain circumstances be subordinated to the claims of general unsecured creditors. Nevertheless, it remains the general principle that a secured creditor has priority over an unsecured creditor".[1]

The right which is given to the creditor by the shipowner in order to secure the payment or the performance of the shipowner is called "Security Interest". The security interest can be in any form of fixed, specific or consensual security interest. The characteristic of the security interest can be described as; the right in an asset given to a creditor by a debtor, given only an interest of the asset of a debtor not the title, given in order to secure an obligation as a collateral for security but not the outright transfer, given a creditor a priority over an asset from other creditors, the asset which can be force sale by a creditor when an obligation is unpaid and the agreement restricts the debtor's right to dispose the security interest.[2] [3]

---

[1] Goode on Legal Problems of Credit and Security, *Roy Goode*, 4th edition, edited by *Louise Gullifer,* Sweet & Maxwell, Thomson Reuters, 2008, para. 1-2.

[2] *Roy Goode*, Goode on Legal Problem of Credit and Security, op. cit., para. 1-16.

[3] Comparative Law of Security Interests and Title Finance, *Philip R Wood*, Second Edition, Thomson Sweet & Maxwell, London, 2007, p. 25.

Generally the most important subjects of security are tangible assets, for example, real estate; building and land, other properties; car, machine and ship. However, the intangible assets have developed its importance significantly as collateral. For example, intangible assets include, especially in finance sector, patents and trademarks, title documents of goods, negotiable instruments, negotiable securities and receivables. In shipping finance, the ship is likely to be the only substantial asset of the shipowner. However, the value of the ship is uncertain and obviously will be depreciated by the fluctuation of the market and its operation which may cause the regular wear and tear or suffer the other damages. The appraisal value of the ship at the time when it is mortgaged is always higher than the value when it is actually sold in order to compensate the debt. In addition to the ship itself, the creditor has begun to seek additional security which is available from the shipowner by paying a great attention on the source which gives the ability to repay the debt of the shipowner, in the other word, the source of income. The creditor will look closely to the anticipated cash flow sources.

The followings are the *standard security*[4] [5] which the creditor commonly pays attention and requires in order to secure the shipping finance transaction, however, most of the time, the shipping finance transactions are not identical. There are many factors for the creditor to decide what he will require from the shipowner, for example, the performance of the shipowner in the past through a good and bad market during a certain period of time, thus, the requirement of the security may vary. The creditor will consider the appropriated requirement of security from the shipowner depends on each particular case. The details of each standard security will be discussed further below.

## 2.1 Mortgage of the ship

The first and foremost important security in shipping finance is the mortgage of the ship itself as it is merely one type of real security. Moreover, it is the only significant physical

[4] Perfecting and Enforcing Your Security, Presentation to the Dublin Ship Finance and Investment Forum, 11 November 2008 by *Matheson Ormsby Prentice*.

[5] Shipping Finance, *Stephenson Harwood*, Third Edition, Euromoney Books, 2006, p. 30-32.

asset of the shipowner which its value can be the primary remedy for the creditor when the debt is in the event of default. In principle, the ship mortgage registration is required[6] to be registered in an appropriate jurisdiction, in particular, at the relevant ship registry and the mortgage will be governed by the law of such jurisdiction where the ship registered. The requirement and protection will vary from jurisdiction to jurisdiction. It will be sufficient to create a *prima facie* evidence and legally enforceable.[7]

The ship mortgage prevents the mortgagee from the general creditors of the shipowner to sell the ship in order to satisfy their claims. Furthermore, the mortgage will give not only the personal rights against the shipowner but also the *in rem* rights which are the right against the ship itself. The mortgagee is entitled to sell or take possession of the ship with the purpose of recovering from the default repayment of the shipowner.[8]

## 2.2 Assignment of all insurances of the ship

Shipping industry is among the largest and most expensive industry and also the ship sails to everywhere around the world, therefore, there are considerably possible risks which can occur to the ship. The risk can cause potentially significant loss to the shipowner because the relevant cost, for example, repair, towage, salvage, and liability toward other party and so on can be extremely expensive. There is no requirement or duty in general by law for the shipowner to effect the insurance for the ship, though, there may be a law or regulation requires a particular insurance. In practice, the shipowner on his discretion, commonly, effects the insurance to prevent his potential loss.

---

[6] For example, The Norwegian Maritime Code of 24 June 1994 no. 39, Section 41 which provides that the registration of the ship mortgage at an authorized register as a condition for legal protection.

[7] The mortgage registration shall entitle the mortgagee to acquire the priority over the other claims against the ship, for example, the Norwegian Maritime Code, op.cit., Section 23, "Priority" which provides that the registered acquisition of rights rank in priority before those not registered.

[8] Further detail on the ship mortgage can be found in "The Law of Ship Mortgages" by *Graeme Bowtle and Kevin McGuinness*, Lloyd's Shipping Law Library, 2001.

Commonly, the assignment can be defined as a transfer of rights by the assignor in favour of a third party or the assignee. Assignment of all insurances means all contracts and policies of insurance, for example, hull insurance, protection and indemnity insurance and war risk insurance. The creditor will normally make a condition precedent to grant the loan and also when the ship is mortgaged that the shipowner shall effect the insurance because this will ensure that if there is any loss occurred to the ship, it will be protected and covered by the insurance.[9] In marine insurance, the policy can be assigned to pass the beneficial interest of the policy to the third party; hence, the creditor will require the shipowner to assign the insurance to him as a beneficiary. In general, the notice of assignment shall be given to the insurer.[10]

## 2.3 Assignment of all earnings of the ship

In order to acquire the right to the earnings, the creditor will require the shipowner to assign the potential earnings of the ship. The assignment of earnings will be an assignment with regard to all the earnings of the ship receivable by the shipowner which includes, for instance, hire and freight from the charterparty which is payable in the future under an existing contract for the account of shipowner, pool income, all remunerations from salvage and towage services, demurrage and detention money, contribution in general average, compensation of any requisition for hire, damages and payments for breach in accordance with the court order, arbitral tribunal award or an agreement.

In general, the assignment of earnings will be included together with the deed of covenant; however, the separated assignment can be made as well. Furthermore, a notice of the assignment will normally be given to the person, who has a duty according to an order, award or agreement, to pay the earnings to the shipowner. Upon an acknowledgment of a

---

[9] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 101, "In practice, a mortgagee will require the owner either to insure the ship in the names of the owner and the mortgagee for their separate interest…".

[10] For the purpose of the perfection of a legal assignment, the insurer shall be given the notice of assignment., *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 105-106 (See (1827) 3 Russ. 1, 38 E.R. 475, 492. This rule provides that assignments rank in the order in which notice of assignment is given to the debtor.).

notice, that person may be required to pay the appropriate earnings to the creditor or by his instruction. The assignment of earnings will be discussed further in Chapter 3.

## 2.4 Assignment of any requisition compensation of the ship

The requisition is the event when the ship is compulsorily acquired either by the statute or prerogative of its flag state during, in particular, the war situation in order to make use of the ship as a carrier to transport people, troop or supply victuals. The state may take a possession of the ownership of the ship, which is called the "*requisition for title*."[11] Nevertheless, instead of taking a possession of the ownership of the ship, the state may force the shipowner to charter the ship to the state and the shipowner will receive a charter hire in return as a regular charterparty, this is called the "*requisition for hire*."[12] In the requisition case, the state will either compensate or pay hire to the shipowner. Therefore, all compensations or other money which may be payable to the shipowner and/or the charterer as a result of the ship being requisitioned, is another source of income of the shipowner which the creditor will require to be assigned. Generally, the hire will be included in the general meaning of earnings of the assignment of earnings but the requisition compensation is not. Moreover, it should be noted that the requisition is normally not covered by the war risk insurance so it will not be included in the assignment of insurance as well.[13] The requisition compensation should be assigned individually.[14]

## 2.5 Parental or personal guarantees and indemnities

In order to make the loan more secured, the creditor also can seek a guarantee and indemnity from a third party in the case that the shipowner is in the event of default so that the creditor will be able to claim directly against the guarantor as the guarantee is a

---

[11] *Stephenson Harwood*, op. cit., p. 234.

[12] Ibid.

[13] The requisition of the ship may be covered in a particular case, for example, the Norwegian Marine Insurance Plan of 1996, §2-9 third paragraph (a) provides that the requisition for ownership or use by a foreign State power can be covered under the war insurance if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association.

[14] *Stephenson Harwood*, op. cit., p. 234-235.

secondary obligation which is taken up by the guarantor.[15] The guarantee and indemnity can be made either by individual, individuals or a company which commonly is the parent company of the shipowner because the parent company normally possesses considerable assets on its own. The guarantee is agreed and signed separately from the loan agreement by the guarantor; hence, the liability of the guarantor toward the creditor is independent. If the shipowner fails to fulfil his obligation, the guarantor shall be liable and indemnify to the creditor as if he is a principle debtor for the shipowner's obligation.[16]

## 2.6 A charge or pledge over shares of borrower

As another additional security over the debt of the shipowner, the creditor will require a charge or pledge over the shares of the shipowner. The advantage of this security for the creditor is that, in the event of default, the creditor will be able to sell the company of the shipowner not only the ship itself which will be normally mortgaged in favour of the creditor. In general practice, the creditor will obtain an obsession of the share certificates in order to complete the security and once the repayment of the debt has been made, the creditor will return the certificates to the borrower.[17] Besides the share certificate to be deposited to the creditor, in addition, some executed documents will be required in blank form of a transfer of the shares and resignation of all directors with the purpose of the creditor to easily replace the directors within its own nominees and manage the company of the shipowner in the event of default.[18]

---

[15] The Modern Contract of Guarantee, *Dr James O'Donovan and Dr John Phillips*, English Edition, Thomson Sweet & Maxwell, London, 2003, p. 10 (See *Turner Manufacturing Co Pty Ltd v Senes* [1964] N.S.W.R. 692; *Coady v J Lewis & Sons Ltd* [1951] 3 D.L.R. 845.

[16] The guarantee agreement is a sperated agreement so the gurantor shall be liable directly to the creditor if the borrower is fail to make the repayment. This can be found in the text in "Guarantee and indemnity" clause in an agreement with a bank, see a sample of the clause in *Stephenson Harwood*, op. cit., p. 242.

[17] Shares and Other Securities In the Conflict of Laws, *Maisie Ooi*, Oxford University Press, 2003, p. 56.

[18] *Stephenson Harwood*, op. cit., p. 248-250.

## 2.7 Security over cash deposits or bank account deposits

Cash is considered as an excellent security because it can be utilized to compensate the outstanding debt to the creditor immediately and also, although the sum of cash in the bank account will not be greater but the potential cash flow through the bank account may be considerable. While the other assets have to be pushed through several processes, for instance, selling, in order to obtain cash to compensate the outstanding debt. The creditor, therefore, normally requires the cash deposit or bank account of the shipowner to be secured in favour of the creditor.[19] In order to take a bank account as security, it can be effected by either assignment which is made solely with the purpose of securing the payment of the assignee or by way of charge.[20]

## 2.8 General debenture over the assets of borrower

In general terminology, a debenture is defined as a certificate issued by a company to acknowledge that the company has borrowed money and an interest will be paid. Particularly, in law terminology, a debenture is defined as a document that creates a debt or in the purpose of acknowledging about it. A debenture can be a medium to long-term borrowing facility issued by a company. The document, which is issued in order to secure the debt, if it is a charge over land, it will be called "*mortgage*", however, if it is a charge over the other assets of the company, it will be called "*debenture*". In order to acquire an additional security, the creditor will require a charge over the other assets of the shipowner besides those which fall into the other category of security.[21]

## 2.9 Assignment of borrower's rights under shipbuilding contract for new builds

Shipbuilding contract will normally specify for the buyer to be responsible to pay for the cost of construction and delivery of the new build. Commonly, the payment will be made in instalments and due upon the period specified by the seller. This is the case that a buyer

---

[19] Ibid., p. 246-248.

[20] Ellinger's Modern Banking Law, *E.P. Ellinger, E. Lomnicka and R.J.A. Hooley*, Fourth Edition, Oxford University Press, 2006 p. 830-831.

[21] Read further; *Stephenson Harwood*, op. cit., p. 250-251.

would like to purchase a new build from a seller and also obtain a bank finance to pay for the new build. By granting the loan for the buyer to purchase a new build, the creditor may encounter a difficulty with respect to the security because the new build is not yet an asset of the buyer during the construction at the shipyard. Even though, there is a possibility in some jurisdictions to mortgage the new build during its construction but it is also impossible in some jurisdictions. The security which is required in the case of the new build is commonly an assignment of rights under the shipbuilding contract. In the event of default, this security will allow the creditor to step into the buyer's position in order to continue to construct the new build until its delivery so that the creditor will be able to sell the new build after its completion to counterbalance the outstanding debt.[22]

## 2.10 Assignment of refund guarantee for new builds

In the reference to the 2.9, another security which is required by the creditor in the case of the new build during the construction period is an assignment of refund guarantee. In the shipbuilding industry, the refund guarantee is an important document which is normally required by the buyer and its financier. The purpose of the refund guarantee is to hold security from the shipyard in the case that the shipyard is unable to deliver the ship to the buyer, then the buyer will be receive a refund. [23]

There are several standard securities required by the creditor in the shipping finance and the requirement of which security will be taken on to secure the debt will vary from case to case. However, if the ship is chartered out by the shipowner, the charterparty is still the common requirement by the creditor. The charterparty as a security in shipping finance will be discussed in the following Chapter 3.

[22] Read further, *Stephenson Harwood*, op. cit., "the financing of new buildings."

[23] Ibid.

# 3 Charterparty as a Security

## 3.1 Assignment of earnings

As in the overview of standard securities in shipping finance, the reason why the creditor also requires other forms of security to secure the repayment of the debt because it is common that the shipowner earn an income from operating the ship. Therefore, the ship is the only significant asset of the shipowner. When the creditor pays attention to the cash flow of the shipowner which he also intends to be able to take control over it, the assignment of earnings will be first important source of income where the shipowner earns money from. Moreover, it will reflect the ability of the shipowner in the repayment of the outstanding debt. The assignment of earnings is referred to all assignment with respect to all earnings of the ship receivable by the shipowner, for instance, all remunerations including hire, freight, towage services, salvage, detention and demurrage charge, contributions from general average, requisition compensation, damage compensation and other payments in accordance with the court order, arbitral tribunal award or an agreement. [24]

When the shipowner is in the event of default to repay the loan and interest at the time specified under the loan agreement, the creditor shall demand the repayment of the outstanding debt and enforce the securities. In principle, the mortgage of the ship should be the first priority of security to be enforced because its value is likely sufficient to compensate the majority or partial of the outstanding debt more than the other securities.[25] The creditor is able to take the possession of the ship or arrest the ship in compliance with

[24] *Stephenson Harwood*, op. cit., p. 226.

[25] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 79 "The principle rights of the owner are to redeem the mortgage and to retain possession of and to operate the ship."

the legal proceedings and then proceed the sale of the ship immediately.[26] However, it is not always that the creditor will choose to enforce the mortgage of the ship right away because of the financial and commercial reason; instead of halting the business, the creditor may allow the ship to continue operating and trading. When the ship operates, it means that the ship still has ability to earn money which will create the cash flow in the business of the shipowner. In that case, the shipowner is still able to earn the income and the creditor may choose to enforce the other securities, for example, the assignment of earnings and insurance which are assigned in favour of the creditor to gain the benefit thereof. Therefore, when it comes to the enforcement of the security, the assignment of earnings also provide an alternative for the creditor in order to satisfy the outstanding debt.

## 3.2 Assignment of charterparty

The main purpose in the operation of commercial shipping business is to earn the income from the use of the ship, therefore, the shipowner has to utilise the ship efficiently in order to earn considerable income to sustain the business and gain profit. There may be several ways to earn the income, however, the principle earnings for the shipowner is commonly from the use of the ship by the charterer. The shipowner will receive either hire or freight from the charterer and it is considered to be an importance source of income.

As a general definition of charterparty, the charterparty is a contract between the shipowner and the charterer that the shipowner agrees for the charterer to use the ship and the shipowner will receive the remuneration in return.[27] There are three basic categories of charterparty which give the rights and duty between the shipowner and the charterer differently in each one. The charterparty is normally in a standard from prepared by Baltic and International Maritime Council (BIMCO) which is an independent international shipping trade association. However, the supplemental clauses may be added to the

---

[26] Read further; *Graeme Bowtle and Kevin McGuinness*, op. cit., Ch. 7 "Default and enforcement".

[27] Scandinavian Maritime Law, the Norwegian Perspective, Second Edition, *Thor Falkanger, Hans Jacob Bull and Lasse Brautaset*, Universitetsforlaget, 2004, Ch. 13, 15, 16 and 17.

standard form depending on each particular charterparty. The three categories of charterparty are described below.

### 3.2.1 Voyage charterparty

The most widely used charterparty in shipping industry is the voyage charterparty. The voyage charterparty is the charterparty which the charterer will deliver the cargo to the shipowner and then the shipowner will load the cargo on named ship from one port and will discharge the cargo at another port. In return, the shipowner will receive the remuneration from the voyage charterer, as it is specifically called "*freight*". The freight will be calculated per voyage basis and determined by the distance of each voyage, irrespective of the time consuming. In the voyage charterparty, the shipowner shall operate and maintain the ship and also provide the manning; master and crews and be liable for their acts. Moreover, the shipowner shall bear all potential risks to the ship and injury to the crews. The shipowner will also responsible for the expenses in relation to the ship and voyage, for instance, capital cost, maintenance, salary, port expenses, bunker, canal charges, loading and discharging expenses, etc.[28]

The voyage charterparty may be too short to serve as the primary security for a long term shipping finance loan. However, if the charterer agrees to the shipowner and commit that he will provide a number of voyages which will establish consecutive voyages, which is called "*consecutive voyage charterparty.*"[29] This may create adequate revenue for the shipowner during the period of such consecutive voyages and may be able to secure the long term loan.[30]

In some circumstances, in particular the case of consecutive voyage charterparty which the freight has been agreed and fixed, it is important for the shipowner to protect himself from

---

[28] *Thor Falkanger, Hans Jacob Bull and Lasse Brautaset*, op.cit.

[29] See the definition of consecutive voyages, The Norwegian Maritime Code, op. cit., Section 321.

[30] Practice and Law of International Ship Finance, *Yo Maruno*, University of Southampton, Faculty of Law, 1979, page 257-262.

a certain situation causing the fluctuation of the cost which will affect to the increase of expenses borne by the shipowner during the voyage. Among those expenses, the bunker cost is considerably important, especially in the oil price situation recently which fluctuated dramatically. This situation can be protected by specifying in the "*Escalation Clause*".[31]

### 3.2.2 Time charterparty

The time charterparty is the charterparty that the shipowner agrees that the ship will be available for the time charterer during a specific period. In return, the shipowner shall receive the remuneration which will be calculated depending on the length of time that the ship is at the time charterer disposal, as it is specifically called "*hire*". Furthermore, the shipowner shall receive the remuneration whether or not the ship is traded. Similar to the voyage charterparty, the shipowner is responsible for the operation of the ship, manning; master and crews and be liable for their acts. However, the ship shall be sailed as directed by the time charterer. In general, the fixed expenses for the operation of the ship shall be responsible by the shipowner, for instance, the cost of maintenance and salary. Nonetheless, the time charterer shall be responsible for the subsequent expense according to his order while the ship is under his disposal and the commercial employment, for instance, port dues, loading and discharging expenses, bunker, etc.[32]

Usually, the charter hire of the time charterparty is significantly higher than the bareboat charterparty because the shipowner still has his responsibility over the operation of the ship during the time charterparty period. The time charterparty obviously has a length of a contract longer than the regular voyage charterparty so it is worth to take as a security for a long term shipping finance loan. However, under certain circumstances, the default of the payment of the charter hire may arise causing by; for example, the ship goes off hire and other unexpected losses to the ship and the crews during the voyage. The maritime lien or

---

[31] "Escalation Clause" is the clause in a contract which guarantees that, in the case that there is a particular factor beyond the control of both parties and affecting the agreed price, can be changed.

[32] *Thor Falkanger, Hans Jacob Bull and Lasse Brautaset*, op.cit.

liability occurred from such losses may affect to the charter hire which is earnings of the shipowner and eventually affect to the creditor.

It is necessary for the shipowner to provide a protection of those uncertain circumstances by stipulating in the several clauses in the time charterparty. This will also protect the benefit of the creditor as well. For instance, "*Off-Hire Clause*", the shipowner normally effect the off-hire insurance which may be responsible and pay for a specified amount per day during the specified period due to the ship is out of service, though, the deductible period may be applied. The creditor definitely wishes the shipowner to maintain such insurance during the loan period. In "*Escalation Clause*", the shipowner is able to change or raise the charter hire due to the increasing cost with respect to crew expenses, insurance, maintenance and currency, for instance. The rate can be increased in a fixed percentage rate or in the other agreed methods.[33]

### 3.2.3 Bareboat charterparty

The bareboat charterparty or demise charterparty shares some characteristics with the time charterparty. The distinctive difference is the bareboat charterer shall be responsible for the operation of the ship on his own account which includes both commercial employment and navigation management. The bareboat charterparty is also responsible for all expenses occurring during the charter period, for example, maintenance expenses, port dues, bunkers, loading and discharging expenses. The shipowner only delivers named ship in a proper agreed condition according to a contract to the bareboat charterer and then he will make the ship properly equipped and engage the master and crews on board. The bareboat charterer is able to trade the ship on his own account under the restrictions stipulated in the bareboat charterparty. The shipowner will receive the remuneration in return, as it is also called "*hire*" as the time charterparty. The bareboat charterer, therefore, is in the position as if he is a shipowner or temporary owner.[34]

---

[33] *Yo Maruno*, op. cit., p. 249-257.

[34] *Thor Falkanger, Hans Jacob Bull and Lasse Brautaset*, op. cit.

The period of the bareboat charterparty is normally long, therefore, it is worth to be a security for a long term shipping finance loan for the creditor. It should be noted that the "*Escalation Clause*" cannot be provided under the bareboat charterparty because all the ship operation expenses, which are usually borne by the shipowner, are on the bareboat charterer account. However, for example, the change or increase of the interest rate of the shipowner's loan caused by the fluctuation of market may be stipulated in the "*Special Clause*".[35]

As the charterparty is the most importance source income of the shipowner. When the shipowner enters into the shipping finance transaction to finance the business, the creditor is definitely interested and willing to take the earnings from the charterparty as a security. The creditor shall require the shipowner to assign his right over the charterparty to him so that, in the case of the event of default, the creditor shall be entitled to receive the remuneration and the charterer shall pay the remuneration in compliance with the creditor's instruction. It should be noted that, in the assignment of charterparty, there are three parties involved in the transaction; the creditor, as an *assignee*, the shipowner, as an *assignor* and the charterer who has a contractual relationship with the shipowner not the creditor. However, once the charterer acknowledges or is assumed to acknowledge the assignment, the charterer shall comply the assignee or the creditor's request or instruction.

In general, there will be two types of the assignment of charterparty commonly used in the shipping finance, as follows;

*Assignment of all monies or receivables*

The assignment of all monies receivable under the charterparty which is due or becoming due to the shipowner shall be assigned to the assignee upon the request in order to secure the indebtedness of the shipowner. The fundamental purpose of an assignment of all monies is to ensure that the assignee will receive the payment, either in full amount or by

[35] *Yo Maruno*, op. cit., p. 238-249.

percentage of the charter hire from the charterer directly in the event of default of the shipowner. Generally, the assignment between the assignor and assignee will be effective against the third party, the charterer. However, it depends on the law of each country whether it requires the notice of the assignment to be given to the charterer which will result the validity of the assignment. In general practice, the creditor will send the notice of the assignment to the charterer for evidence purpose and it does not matter if the charterer will return the acknowledgement.[36]

*Assignment of all rights, title and interest*

This is the assignment of charterparty itself including rights, title and interest of the shipowner under the charterparty. In this case, the creditor shall request the shipowner to assign his contractual rights under the charterparty, not only the receivables but also the right to perform the charterparty. The rationale behind this is that, during the charterparty, the creditor will be able to receive the benefit from the cash flow, however, in the event of insolvency or bankruptcy of the shipowner, the charterparty maybe ceased and so the cash flow. This is the case where the creditor needs some extra rights additionally from the assignment of all monies in order to continue the performance of the ship. The consent of the charterer is necessary in this situation.[37] However, this type of assignment may not be the primary alternative of the creditor because the creditor is normally a financial institute and not a ship operating company. Therefore, the creditor shall have the burden to manage the unfamiliar business if he takes the rights to perform the charterparty replacing the shipowner.

## 3.3 The law of assignment with respect to an assignment of charterparty

First of all, it should be noted that the purpose of the assignment of charterparty is to secure the repayment of the outstanding debt of the shipowner in favour of the creditor. Therefore the creditor normally has no intention to take the position and to perform the obligation of the shipowner under the charterparty; the creditor will be more interested in the receivables

[36] *Yo Maruno*, op. cit., p. 264-271.

[37] *Yo Maruno*, op. cit., p. 271-275.

of the shipowner which is the charter hire or freight. It is unlike the assignment of contractual rights of sale, building contract, or in a particular case, charterparty, for instance, which the assignment is definite and outright. The law with respect to the assignment of charterparty varies from country to country, especially between the civil law and common law systems, which will provide both requirement and effect differently. In this section will present the legislation with respect to the assignment of charterparty, particularly "*receivables",* as a security of Norway as an example of civil law system and England as an example of common law system since the concept of the legislation in this matter of these two countries are different in some ways.

### 3.3.1 Norway

The legislation which gives the legal basis for the assignment of charterparty as a security in Norway is *"The Mortgage Act ("Lov om pant") of 8 February 1980 (N0.2)*". There are two methods that the creditor can obtain the assignment of charterparty as a security which provided under the Mortgage Act, in particular Chapter 4: *"Contractual lien on securities, non-negotiable money claims etc"* (*Kap. 4. Avtalepant i verdipapirer, finansielle instrumenter registrert i et verdipapirregister, aksjer, enkle pengekrav m.m.*)

#### 3.3.1.1 Assignment of individual money claim

The regulation with regard to the assignment of individual money claim are regulated in §§ 4-4 and 4-9 and in addition the perfection of the assignment is regulated in § 4-5 of the Mortgage Act for non-negotiable money claim (*enkle pengekrav*).

The receivables falls under the definition of "non-negotiable money claims" given in § 4-4 which states that *"*...Which non-negotiable money claims can be attached...*"*[38]

Therefore the receivables, by its nature, can be attached by mean of § 4-4. Furthermore, the attachment on the receivables can be made in the purpose of security assignment which it is

[38] The English translation of Norwegian Mortgage Act of 8 February 1980 (No. 2), by the Government Authorized Translator, Jørgen W. Sandberg, Oslo.

also supplemented by § 4-9 specifically for the assignment for security purpose, which states that

"...will similarly apply when ownership of a non-negotiable claim has been assigned for security purposes, so that a final settlement is to be made between the parties in the assignment contract".[39]

The assignment of this individual money claim is able to acquire the legal protection, according to § 4-5 (1) which provides that lien on non-negotiable claims will acquire legal protection when the notice of assignment is given to the debtor by either the assignor or assignee. This means that in order to acquire the legal protection for the assignment of charterparty, either the creditor or the shipowner shall give the notice of assignment to the charterer. Commonly, the creditor will give such notice to the charterer and also require the charterer to sign the acknowledgement for evidence purpose. However, the assignment of charterparty shall be deemed perfected without the acknowledgement from the charterer. The decisive matter is the notice of the assignment has to be given to the charterer.

#### 3.3.1.2 Assignment of receivables, also known as "factoring"

The assignment of receivables or factoring is regulated in § 4-10 of the Mortgage Act. Factoring is a special assignment available only for the business enterprises which is registered at a competent registration office not an individual or individuals, according to § 4-10 (1) which states that

"(1) an business enterprise may conclude an agreement to assign, assign for security purpose or attach the non-negotiable money claims which it has or acquires in its business or a specific part thereof. It is not necessary to name the debtors..."[40]

The regulation allows the business enterprise to assign the non-negotiable money claim or trade receivables which acquired from its business operation as collateral in order to secure

[39] Ibid.

[40] Ibid.

its debt to the creditor. The trade receivables under the factoring agreement can include both present and future receivables of the entire business enterprise or only part of it. The charter hire or freight received under the charterparty is the important income of the shipowner; therefore, it is the receivables which can be assigned as a security under factoring according to this section. Furthermore, there is no need to specify the name of debtors of such business enterprise and also it is implicit that there is no particular notice required to be given to the debtors. Practically, the debtor will be informed by way of business practice, for instance, notice or invoice which refers to whom the debtor should make a payment to. The charter hire and freight payable under the charterparty is deemed to be included in the factoring agreement by mean of this section.

The registration of the factoring agreement is required, according to § 4-10 (2) which states that

"(2)…acquires legal protection by being entered in the enterprise's sheet in the moveable property register. Right under such agreement may however not be invoked against those who have acquired in prudent good faith a competing right to a claim which is comprised under the agreement and who have acquired legal protection of their acquisition under §4-5 above or under §29 of the Promissory Notes Act…"[41]

In order to acquire the legal protection, the factoring agreement has to be registered at the moveable property register and this will secured the registered creditor against the other creditors.

Furthermore, it should be noted that there is a weakness of the factoring agreement method in order to assign the receivables for security purpose. According to § 4-10 (2) which also provides an exception that the registered right may not be absolute and acquire fully priority over the security. The right of the creditor under the factoring agreement may not be invoked against the third party who have acquired the assignment over the receivables and actually received it in good faith and also acquired the legal protection for such

[41] Ibid.

assignment from the other sections of the Mortgage Act and also the Promissory Notes Act.

Even though, there are two possible methods which the creditor can choose from the Norwegian Mortgage Act either individual or factoring to acquire the right over the assignment of charterparty with the legal protection against the other creditors, the application of one method will not preclude the application of the other. These two methods are supposed to supplement each other.[42] It is practical to combine them to make the assignment more secured. Therefore, the charterparty can be assigned as a specific assignment according to §§ 4-4 and 4-9 which perfects by giving the notice to the charterer and also registered at the moveable property register under the factoring agreement. This will ensure that the creditor will be fully secured from the assignment of charterparty and also prevented from the unexpected assignment of the third party which may supersede his right, according to § 4-10 (2).

The right of the creditor under the assignment of charterparty is also provided in the Mortgage Act. According to § 4-9 which states that in order to make a final settlement between the parties in the assignment contract, § 4-6 (2) shall be applied to the assignment for security purpose when the assignor has assigned a non-negotiable claim, in this case, the receivables of the charterparty, to the assignee. According to § 4-6 (2), the creditor may only dispose the assignment of receivables of the charterparty to the extent which is necessary to cover the outstanding debt which the charterparty is assigned to secure. The creditor does not have a greater right to the claim than the assignor has.[43] In case of the assignment of charterparty, therefore, the creditor does not have a better right than the right of the shipowner having toward the charterer in the charter hire or freight. Under Norwegian law with respect to the assignment for security purpose, "...is normally created as a

---

[42]Norwegian Ship Finance: Ownership and Security, A Legal Guide to Ship Finance (a supplement to Asset Finance & Leasing Digest), *Lars Musæus and Sinde Walderhaug, Simonsen & Musæus*, 199?.

[43] Norsk Lovkommentar, Lover og kommentarer, L08.02.1980 nr.2 Panteloven, §4-6 (2), *Ved Jens Edvin A. Skoghøy.*

pledge which does not involve immediate transfer of rights but is passive until and if the security assignment is enforced"[44]

In the other word, the right will not be transferred immediately to the assignee at the time of effecting the assignment; unless the assignment is enforced then the transfer will be effected. In addition, the assignment of contractual rights as a security, other than receivables, is ambiguous with respect to the possibility of its validity and enforceability. There is no decisive on this matter found in both the legal authority and Norwegian legal theory.[45]

### 3.3.2 England

First of all, it is necessary to explain the major method using to acquire the attachment of security interest in receivables under English law; "*Assignment*" and "*Novation*". In principle, the term "*Assignment*" is used when only the rights under contract of the assignor transferred to the assignee and the identity of the contracting parties is not changed.[46] In opposition, the term "*Novation*" is used when both rights and obligations under contract of the assignor transferred to the assignee and change of parties as well as their consent is required.[47] These two methods give the different rights and effect to the creditor when he acquires the attachment of security interest in the receivables of the borrower. Thus, there are two major distinctions between those terms that, firstly, for "*assignment"*, the assignee will be entitled to the payment in place of the assignor upon giving of the notice to the debtor of the assignor and the consent of such debtor is not required, but for *"novation"*, the consent of the debtor of the assignor is required because there will be a change of the parties to the contract. Secondly, for *"assignment"*, the assignee will be entitled to the claim over the original debt which the assignor has against its debtor, but for "*novation*",

---

[44] Assignment of Contractual rights-Legal and Lingual Challenges, Wikborg Rein's Shipping Update1/2007, by *Linn Hertwig Eidsheim and Marie Efpraxiadis.*

[45] Ibid.

[46] *Roy Goode*, Goode on Legal Problems of Credit and Security, op. cit., para. 3-03.

[47] *Linn Hertwig Eidsheim and Marie Efpraxiadis*, op. cit.

the creditor will take place the existing debt as it will be changed to a new debt between the creditor and the debtor of the assignor.[48] In the other word, the assignee will replace the assignor as a creditor of the assignor's debtor.

The assignment of charterparty is usually fallen into the term "*assignment*", as mentioned before that the creditor normally has only intention to acquire the benefit which is the security interest in the receivables of the shipowner not the obligations which the shipowner has toward the charterer. The main reason is because it is out of the creditor's expertise to manage the ship under the charterparty and it can cause the complexity. However, *"novation"* also can be an alternative for the assignment and this depends on a particular case.

There are two possible ways for the creditor to acquire the attachment of security interest in the receivables of the shipowner by way of the assignment of charterparty under English law; "*Absolute assignment or legal assignment"* and "*Charge or equitable assignment."*

#### 3.3.2.1 Absolute Assignment (Legal Assignment or Statutory Assignment)

In English law, in order for the creditor to acquire the attachment of security interest in the receivables from the shipowner, the creditor will normally require the shipowner to assign his right to the receivables from the charterer under the charterparty. The assignment may be an absolute assignment which such right can be re-assigned back to the shipowner when the repayment of the debt has been made.[49] In addition, the assignment generally may be given over either "present debts" and "future debts" or only one of those. The present debts can be assigned under the law which allows the assignee to sue the debtor of the assignor under his own name. The future debts as earnings payable in the future can be assigned under Section 136 if it is included in the contract when the assignment is concluded. However, the future debts will take effect in equity instead which allows the assignee to sue the debtor of the assignor by joining the assignor, as it is called "*equitable*

[48] *Roy Goode*, Goode on Legal Problems of Credit and Security, op. cit., para. 3-03.

[49] *Graeme Bowtle and Kevin McGuinness*, op.cit., p. 83.

*assignment*."[50] [51] in the case that, at the time of the assignment, such future earnings is not included or entered in the assignment[52], subsequently such earnings will be deemed as "*future chose in action*" and Section 136, which will be explained below, shall not apply. The equitable assignment will be discussed in 3.3.2.2 below.

When the creditor requires the shipowner to assign his right to the receivables under the charterparty in order to secure the debt, Under English law, this situation will fall to the Law of Property Act 1925, Section 136 which provides that

"(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—

(a) the legal right to such debt or thing in action;

(b) all legal and other remedies for the same; and

(c) the power to give a good discharge for the same without the concurrence of the assignor...."

Section 136 provides the requirements in order for the assignment to acquire the legal protection and also provides the right of the assignor after the assignment has been fulfilled the requirements. The assignment under the Section 136 is the absolute assignment. The assignment can be contained and included in the deed of covenant, however, it may be contained in a separate document which the creditor will normally prefer the latter. The requirements in accordance with Section 136 are described as follows;

---

[50] *Roy Goode*, Goode on Legal Problems of Credit and Security, op. cit., para. 3-11.

[51] Equitable assignment is the assignment which does not meet the requirement of the regulation on assignment but it can be valid and enforceable by the courts on the ground of interest and justice.

[52] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 84.

*The assignment must be in writing.* It is explicit in the word itself that the assignment must be in writing, therefore, the oral assignment cannot be made and will not acquire the legal protection from this section.

*The assignment must be signed by the assignor.* It is important that the assignor has to sign the assignment because he is the one who assigns his right in favour of the assignee. There is no requirement under this section for the assignee to sign the assignment.

*The assignment must be absolute and not purporting to be by way of charge only.*[53] It should be noted that, in order to be a valid legal assignment in accordance with Section 136, the assignment must be the whole of the chose in action. Even though an outstanding balance can be assigned under this section, but a part of the debt is subject to be a charge only. [54] The detail of a charge is discussed in 3.3.2.2 below.

*The notice of the assignment must be given to the debtor of the assignor and the notice has to be in writing.* The notice can be given by either assignor or assignee. There is no requirement for the debtor of the assignor to sign the acknowledgement in response to the notice. In practice but not required by law, when the creditor gives the notice of assignment to the charterer, the creditor will also require the charterer to sign the acknowledgement that he has received the notice of the assignment for evidence purpose. However, if there is no acknowledgement from the charterer, the assignment of charterparty is still effective.[55] Furthermore, even though, there is also no requirement on the timing when the notice of the assignment has to be given to the charterer but the notice should be given in a proper time and as soon as the loan has been granted to the shipowner.

---

[53] *Stephenson Harwood*, op. cit., p 227 (See *Raiffeison Zentralbank Osterreich AG v Fire Star General Trading LLC and others* [2001] 3 All ER 257, in relation to circumstances when an assignment of insurances will be considered an equitable assignment as opposed to a legal assignment.).

[54] *Stephenson Harwood*, op. cit., p. 229 (See *Mercantile Bank of London v. Evans* [1899] 2 QB 613).

[55] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 87.

The assignment that satisfies all the requirements under Section 136 shall be deemed as a legal absolute assignment. Section 136 also provides that once the assignment has been executed, the following rights of the assignor shall be passed and transferred to the assignee from the date that the notice of assignment has been given to the debtor of the assignor; the legal right to the debtor or other chose in action, all legal and other remedies for the recovery of the debt or the enforcement of the chose in action and the power to give a good discharge without involving the assignor.[56]

It is a reminder that as a general and important principle in English law that the assignee shall not has a better position than the assignor.

#### 3.3.2.2 Charge (Equitable Assignment)

A charge is the right where the debtor (the "*chargor*") gives the limited interest on the property in favour of its creditor (the *"chargee*") to seize and sell the charged property in order to satisfy the outstanding debt, nevertheless, the sale of the property has to be made by the order of the court. A charge is different from the mortgage because there is no transfer of the ownership only gives the proprietary right thus a charge is mere encumbrance.[57] In addition, with respect to the ownership matter, the chargor cannot be affected by novation. Mostly the charge has legal effects as applied to the mortgage or assignment but it will be greatly different when it comes to the enforcement. In order to acquire the recovery of the debt, the chargee is not entitled to participate as a party in any legal proceeding unless the chargee has to participate as either co-claimant or co-defendant with the chargor in order to enforce or protect its right over the charged property. In the charterparty, there may be an intention to create contractual liens on ships to secure the debt which can be enforceable and is equitable charge.[58] In addition, in the case that the assignment of charterparty does not fulfil the requirements of Section 136 or assign only a

[56] Ibid., p. 227.

[57] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 50.

[58] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 51.

part or specific right not a whole then it is not an absolute assignment but by way of charge, it may be effective as an equitable assignment.[59]

With regard to the equitable assignment, it is vital to explain further that the equitable assignment is less strict than the other categories of assignment; mortgage, legal assignment or novation. It is a mere intention which the assignor gives to the assignee explicitly that he will give irrevocable transfer of the receivables to the assignee as a security and the intention is proved truthful, then it shall be deemed as a valid equitable assignment. Moreover, the notice of the assignment is not required and the assignment is still valid and effective, although the debtor of the assignor will not be affected of the assignment until he has received the notice of the assignment. Therefore, no matter if it is required by law or not, the notice of assignment should be given to the debtor of the assignor as soon as the charge has been executed in order to protect the right of the assignee against the other creditors and also when it comes to the enforcement. Under English law, the doctrine of consideration is sometimes applied to the equitable assignment, particularly in the case of the creation of an equitable charge or the future earnings.[60]

### 3.3.3 The difference between Norwegian law and English law

The assignment of charterparty is most likely having the purpose for the assignee to be entitled for the receivables which are charter hire or freight. The Assignment of individual money claim under the Norwegian law is more specific assignment than the factoring method which is universal in receivables of the assignor. Under English law, the absolute assignment is more likely to secure the right of the assignee for the receivables from the charterparty more than the equitable assignment.

---

[59] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 86-87.

[60] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 87 (See Snell's Principles of Equity, p. 79; *Re Earl of Lucan, Hardinge v. Cobden* (1890) 45 Ch. D. 470.

In order to acquire the legal protection, the notice of the assignment shall be given to the debtor of the assignor which is required under both Norwegian and English laws. Then the assignee shall be protected against the other creditors over the same security. However, the transfer of the rights from the assignor to the assignee, in an absolute assignment under English, is present which is transferred when the assignment agreement has been made. The rights later can be re-assigned when the repayment of the debt has been made.[61] In opposition to English law, under Norwegian law, does not provide the transfer of the rights of the assignor immediately upon the completion of the assignment agreement. The right of the assignor will not be transferred to the assignee until the assignment is enforced.[62]

Under Norwegian law, the right of the assignee is given only to dispose of the attached claim to the extent necessary to cover the claim which the assignment is secured. The assignee is entitled to the receivables only. In contrary, under English law, the assignee has an extra right which is to give a good discharge concurrence of the assignor. In addition, the assignment of contractual rights by novation is possible under English law. However, it is unclear under Norwegian law, besides the receivables, whether the assignment of contractual rights is possible.[63] The difference of both laws and, in addition, the widely use of English law in shipping industry, will influence the creditor to choose English law as a governing law of the assignment of charterparty, which they usually do in practice, so that they will be more advantageous over the security.

---

[61] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 84. See W.J. Gough, *Company charges*, 2nd edn (butterworths, London, 1996), p. 17 n. 2. *Hughes v. Pump House Hotel Co. Ltd* [1902] 2 K.B. 190 (C.A.) *per* Cozens-Hardy L.J., at p. 197. See also E.H.T. Snell. R. Megarry, P.V. Baker, *Snell's Principles of Equity*, 29th edn (Sweet & Maxwell, London, 1990), p. 73. *Burlinson v. Hall* (1884) 12 Q.B.D. 347; *Tancred v. Delagoa Bay and East Africa Rly Co.* (1889) 23 Q.B.D. 239; and *Bank of Liverpool & Martins Ltd v. Holland* (1926) 43 T.L.R. 29 (K.B.) *per* Wright, J.

[62] *Linn Hertwig Eidsheim and Marie Efpraxiadis*, op. cit.

[63] Ibid.

The preferred choice of law of the creditor may bring an unexpected difficulty and effect to him if the enforcement of the assignment of charterparty is brought to the court of the country other than the country of the governing law. The potential problem and solution with respect to the choice of law will be discussed in the next chapter.

## 4 Choice of law and the assignment of charterparty

The shipping industry has the international characteristic by itself including shipping finance which unavoidably shares this international characteristic as well, for example, the creditor is a UK bank, the shipowner is Greece and the ship is registered in Norway. First and foremost of the commencement of shipping finance transaction is the loan agreement which is likely, from the example, to be governed by English law as the creditor is UK bank. However the competence of the shipowner to borrow, enter into the loan agreement with the UK creditor and make various covenants is more likely to be governed by Greece law. When it comes to the collateral agreements in order to secure the debt of the shipowner, for instance, the mortgage of the ship will be governed under Norwegian law where the ship is registered. This is only the simple form of the international character of shipping finance transaction which, in reality, is so much more complex. It will be more complicated if there are several forms of security required by the creditor which may be under the law of several countries because the shipowner is likely to have assets or benefits in other countries other than its registered country. Thus, there are various jurisdictions concerning in one shipping finance transaction and the creditor and the shipowner need to acquire a prudent advise from lawyers in each jurisdictions in order to avoid any unforeseeable loss.

The choice of law problem in connection with the assignment of charterparty may also be created due to the charterparty is a collateral agreement made in order to secure the debt in accordance with the loan agreement. Moreover, there are 3 parties involved in the assignment of charterparty; the creditor, the shipowner and the charterer. There are agreements between the shipowner and the charterer in relation to the charterparty and the shipowner and the creditor in relation to the assignment of charterparty. However, the creditor and the charterer are not the direct parties having relationship or obligation to each other under an agreement. The charterer may be obliged toward the creditor in accordance

with the assignment of charterparty between the creditor and shipowner. As a result, those relationships are regulated among them; firstly, the creditor and the shipowner, secondly, the shipowner and the charterer, lastly, the creditor and the charterer.

The choice of the law governing the assignment of charterparty may be either explicitly, implicitly stated in the choice of law clause in the assignment or it may not be stated at all. However the latter case is rare or hardly possible in practice. The question may be arisen when it comes to the enforcement of the assignment of charterparty whether, especially when the dispute is brought to a forum in another jurisdiction different from the law governing the assignment, the choice of law clause can be applicable in such jurisdiction or how much extent of the foreign law can be applicable in other jurisdiction.

## 4.1 General principles of an international agreement[64]

First of all, it is necessary to look at the characteristic of an international agreement which also apply to the assignment of charterparty. The followings are an overview of the important characteristic of an international agreement. Firstly, the assignment of charterparty is, as a general principle, under the principle of party autonomy in international contract law which the parties have freedom to determine the content of an agreement they enter into. The party autonomy also includes the decision of the party to choose which state law shall govern their agreement.

Secondly, the mandatory regulation of state or states where the agreement has connections with is the important obstacle or limitation for the party autonomy principle. The assignment of charterparty is subject to mandatory regulation of one or several states which the assignment has a connection with; the state regulation of the assignor, assignee, charterer and the charterparty. This may limit the party to choose the governing law of the assignment of charterparty freely because the mandatory regulation may has conditions that

[64] Voldgift og Lovvalg Artikler 1979-1998, Choice of Law Problems in International Shipping (Recent Developments), *Sjur Brækhus*, Sjørett, Universitetsforlaget AS 1998, p.52-69.

have to be met or not allow the parties to do so. The mandatory rule can be found in the private international law of each state.

Thirdly, the choice of law clause can be explicitly stated in the agreement which it commonly does. This clause will determine the court and law which will be governed when the dispute arise between the parties under the agreement. The numbers of standard contracts contain this clause in order to prevent the any difficulty to look for a governing law when it comes to the dispute.

Fourthly, in the case the choice of law clause is not stated in the agreement, there are several solutions in order to determine which law shall be applied to the dispute. For example, *Lex loci celebrationis*: the law of the place where the contract is concluded, *Lex loci domicilii* or *lex domicilii*: the law of domicile or nationality of the party, *Lex fori*: the law of the forum, tribunal or court where the dispute has been brought and *Lex loci delictus*: the law of the place where the contact was breach.

And finally, an international agreement commonly contains the content of the jurisdiction and arbitration clauses. These clause states, when the potential dispute has arisen, which court or arbitration tribunal the case shall be brought before.

## 4.2 The validity and effect of the assignment of charterparty

The starting point and simplest way to verify the validity and enforceability of the assignment of charterparty is to look at the law governing the charterparty whether the assignment is possible and permissible. Although, the agreements of both charterparty and assignment of charterparty are separated documents, but the main contract is the charterparty which shall give the right of the shipowner whether he is able to assign the charterparty in favour of the creditor.[65] However, in particular case, it also depends on the

[65] *Roy Goode*, Goode on Legal Problems of Credit and Security, op. cit., para. 3-39, (See the latest discussion on this subject by Professor Goode in "Contractual Prohibitions Against Assignment" Ch. 11 in J. Armour

conditions under the charterparty itself if it allows the assignment to be done over it. If the charterparty is assignable under the law governing the charterparty, then the next step is to look at the law governing the assignment whether it allows the charterparty to be assigned. These problems will probably not a matter anymore in practice. Initially, the replacement of the position of a person was not able to transfer but after a long development of the law in relation to the transferability of debts or other claims and the needs in the commerce, the modern law systems of most countries have abolished this restriction[66] and permit the assignment of receivables, in this case the receivables of charterparty. From the example of Norwegian and English law in Chapter 3, the assignment of charterparty is allowed in both law systems. Finally, the assignment of charterparty has to fulfil all the requirements under the law which governs the assignment in order to acquire the validity and the protection.[67]

## 4.3 The selection of the law governing the assignment of charterparty

When the assignment of charterparty is possible under the law governing the charterparty and the potential law governing the assignment, the next question is what law should be determined to govern the assignment of charterparty and whether it is possible to choose another law besides the law governing the loan agreement or charterparty. There are several theories which give the possibility to choose the governing law for the assignment of charterparty, for instance, the law of the place where the creditor and the shipowner are domiciled, the law of the place where the assignment is executed, the proper law of the assignment and the proper law of the original loan agreement.

The assignment of charterparty is another agreement which is made separately from the other agreements; the loan agreement and charterparty. Therefore, it is possible for the

---

and J. Payne eds, *Rationality in Company Law: Essays in Honour of DD Prentice* (Oxford: Hart Publishing, 2008).

[66] Transnational Commercial Law, Text, Cases, and Materials, *Roy Goode, Herbert Kronke, Ewan McKendrick and Consultant on International Commercial Law and Practice: Jeffrey Wool*, Oxford University Press, 2007, p. 406.

[67] Further reading, *Maisie Ooi*, op. cit., Ch. 8, I "The Validity of an Assignment".

assignment of charterparty to choose a different law independently from the other agreements.

In practice, the creditor who is in a better bargaining position than the shipowner will normally choose the law which gives him the most advantageous over the security of the shipowner. Furthermore, for the sake of consistency with the loan agreement, the creditor may choose the law governing the assignment of charterparty the same as the law governing the loan agreement. The assignment may be included in or separated from the loan agreement and may be executed all in one transaction.

The type of the assignment of charterparty may also influence the creditor to choose the governing law. As mentioned in Chapter 3, the assignment of charterparty may be for either only receivables or all the rights and obligations of the charterparty itself. In the first case, the possible of the law governing the assignment may be preferred by the creditor to choose either the law of the creditor's country or the law of the country where the charterer has a bank account. The purpose of this choice is to receive the receivables from the charterer; the charter hire or freight, more properly and easily for the creditor. In the latter case, when the shipowner is in the event of default or insolvency, the creditor, in accordance with the assignment of charterparty shall be entitled to perform the charterparty in the place of the shipowner in order to receive the cash flow and recover the debt of the shipowner. Therefore, it is more suitable for the creditor to choose the law governing the assignment of charterparty as the same as the law governing the charterparty for the sake of consistency and efficient enforcement.

It should be noted that the substance of the original debt should remain unchanged in every aspect. The assignment of charterparty is a collateral agreement to secure the debt of the shipowner; therefore the rights of the creditor shall not be different from the rights of the shipowner who is the original party under the charterparty. In order to maintain the same rights as the shipowner has, the assignment of charterparty would rather be governed by the law governing the charterparty. The different governing law between the charterparty and

the assignment of charterparty may create or cause an uncertainty of the rights of the creditor. [68]

### 4.4 When the governing law for the assignment of charterparty has been chosen

In ordinary case of the assignment of charterparty, the parties will normally choose the law governing the assignment of a particular jurisdiction, especially the creditor who is more likely to be a person who chooses the law because he is in a better bargaining position. As mentioned above, English law is more preferable than the other law to be the governing law of the assignment of charterparty in the shipping finance. The law governing the assignment of charterparty will be explicitly stated in the choice of law clause in the assignment. In general, the choice of law clause will be respected by the courts.[69] Nonetheless, the choice of law may not be applicable and subjected to some important exceptions and limitations, even though the choice of law has been made expressly by the parties, which will be discussed further below.

#### 4.4.1 The Rome Convention on the Law Applicable to Contractual Obligations 1980

The choice of law matter will be dealing with "Private International Law" which governs mainly for the identification of applicable law in relation to the dispute connecting to several jurisdictions and the recognition and enforcement of the judgements made by foreign courts. Even though, the principle of private international law is common and similar in all states or jurisdictions, but in each jurisdiction has their own private international law. Therefore the private international law is different and varies from jurisdiction to jurisdiction and there is no single set of law which can be applied to all

---

[68] *Yo Maruno*, op. cit., p. 276-283.

[69] *Graeme Bowtle and Kevin McGuinness*, op. cit., p. 245 (See; *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 (H.L.) *per* Lord Reid, at p. 603; *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277(p.C.) *per* Lord Wright. For a case dealing with the grant of an injunction to prohibit the institution of a legal action in New York, in contravention of an agreement providing for the resolution of disputes by arbitration in London, see *XL Insurance Ltd v. Owens Corning* [2000] 2 Lloyds Rep. 500 (Q.B. Com. Ct)).

jurisdictions. However, there is an attempt to harmonise the private international law, especially in between the member states of European Union by provides the solutions and standardises the rules with respect to the choice of law in contract, which is called "*The Rome Convention on the Law Applicable to Contractual Obligations 1980*". The Convention shall apply to contractual obligations in the Contracting States in all cases. However, the application of the Convention is not limited to the Contracting States but also all contracts which have the international characteristic not only in the European Unions, according to Article 1 paragraph 1, "...involving a choice of laws of different countries..."

Moreover, the Convention shall be applicable to any law specified by the Convention as being the applicable law of a contract shall be applied whether or not it is the law of a Contracting State in accordance with Article 2. The Convention, therefore, is generally applied even in non-member states of European Unions.

The Convention provides the freedom for the parties of the contract to choose what law will govern their contract as stated in Article 3 paragraph 1 that

"A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract..."

The choice of law making by the parties must be either expressed or implied by the terms of contract. In the case there is the absence of the choice of law, the Convention also provides the methods to select the applicable law by using the theory of the closet and most real connection according to Article 4 (1).[70]

More important part in the Convention, which is relevant directly to the assignment of charterparty, is that the Convention shall apply to the mutual obligations of the assignor

[70] Commercial Law, *Roy Goode*, Third Edition, LexisNexis UK, 2004, p. 1101.

and assignee under the assignment against the debtor that the assignment shall be governed by the law applicable to the contract between them as according to Article 12 paragraph 1,

"The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor`) shall be governed by the law which under this Convention applies to the contract between the assignor and assignee..."

Furthermore, the law governing the assignment shall determine its assignability, the relationship between the assignee and the debtor [71]and the conditions in order to invoke the assignment against the debtor as stated in Article 12 paragraph 2 that

"... The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

The solutions and rules which are provided under the Convention also reflects the important limitations of the party autonomy in relation to the choice of law governing the assignment of charterparty which are found in choice of law problem in general. The parties shall consider wisely before concluding the assignment in order to prevent an uncertain outcome when the assignment is enforced in a jurisdiction other than the jurisdiction of the governing law. These limitations will be discussed further below.

### 4.4.2 Mandatory rules

The most important principle of the mandatory rules is it shall override the choice of law chosen by the parties. The parties cannot exclude the mandatory rules by the terms of their agreement.[72] It is uncertain and not easy to determine what the mandatory rule is because it is not normally stated expressly in the law of each state. The mandatory rules that can override the choice of law in one state may not be the mandatory rules in another state. The court of each state will decide and determine whether the rule is mandatory which will base

[71] *Raiffeisen Zentralbank Osterreich AG v. Five Star General Trading LLC*, [2001] QB 825.

[72] *Roy Goode*, Commercial Law, op. cit., p. 1093.

on the function of the rule, the rationale and policy underlies the rule and also the other interest in each particular case. The overriding mandatory rules principle is confirmed and can be found in several international principles and conventions with regard to the private international law.[73] Under UNIDROIT Principles, Article 1.4 states that

"Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law"

That means in the case that there is a choice of law problem against the principles, the mandatory shall prevail it. The application of overriding mandatory rules are also provided in the Rome Convention that according to Article 3 paragraph 3, although the parties have chosen a foreign the governing law, shall not prejudice the rule of law of the country which cannot be derogated from by the contract when[74] "all the other elements relevant to the situation at the time of the choice are connected with one country only".

It should be noted that in this case the parties are domestic not international and those non-derogated rules shall belong to the governing law.

However, the mandatory rules of third states may limit or override the choice of law chosen by the parties, if the there is an adequate close connection between the third party and the dispute, according to Article 7 paragraph 1 which states further that

"... In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

---

[73] Lectures on International Commercial Law, *Giuditta Cordero Moss*, Nr. 162, Institutt for privatrett, Universitetet I Oslo, 2003, p. 91.

[74] *Roy Goode*, Commercial Law, op. cit., p. 1099.

This article is still controversial among the signatory states, therefore, in the Rome Convention allows the signatory states is able to reserve their right not to apply the Article 7 paragraph 1, according to Article 22 paragraph 1 (a).[75]

When the case is brought before a court of a particular country, according to Article 7 paragraph 2, the Convention shall not restrict

"...the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

The mandatory rules of the forum may override the governing law chosen by the parties.

### 4.4.3 Ordre Public

Another important limitation of the selection of the law governing the contract is ordre public which in some cases ordre public may discard the choice of law which is made by the parties.[76] As a general principle of the private international law, the court of where the case is brought before will not apply the foreign law chosen to govern the contract by the parties, if the application of such foreign law violates the basic principle of that court's state, it is so called, "*Public Policy or Ordre Public*".[77] Ordre public is the principle that lies underneath the legal systems in each country. The principle addresses the social, moral and economic values which vary in different culture and change over time, that bind the society together.

Ordre public principle is also confirmed in the Rome Convention which states in Article 16 that the application of law of any country may be rejected if the application is apparently incompatible with the order public policy or ordre public of the court of the country where

---

[75] *Roy Goode*, Commercial Law, op. cit., p. 1100, (See Contracts (Applicable Law) Act 1990, s 2(2)).

[76] *Graeme Bowtle and Kevin McGuinness*, op.cit., p. 246, See: *Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406 (C.A.) *per* Lord Denning, M.R., at p.411.

[77] *Roy Goode*, Commercial Law, op. cit., p. 1093.

the dispute is brought before. The proper interpretation of ordre public is narrow and strict language.[78] Ordre public will be applied under particular circumstances by the court of the forum where the judge consider that the application of a foreign law chosen by the parties will conflict with the public policy of the society of such forum.

### 4.4.4 Application of a foreign law in Norwegian court

In Norway, the court, as a general principle, will recognise and apply a foreign law chosen by the parties however a foreign law may be discarded if the agreement is against the ordre public of Norway. In general as the other countries, Norway has its own private international law and in practice the lawyer will find the private international law from the source of the other national laws whether it is regulated by the statutory provisions.[79] However the sources of private international law area are limited in Norway. Base on the literature by Ingvill Helland,

"...the legal practitioner must here as in other cases proceed to look for customary law, as expressed through case-law or other sources. As mentioned before, the most [ractical civil claims in relation to invasions of personality rights are non-contractual claims for compensation. In this field, Norwegian private international law is largely case-law based. The existent case-law, however, does not solve all questions. On certain issues, the law is still unclear...".[80]

Therefore, Norwegian private international law is normally influenced by foreign literatures and the treaties. According to the limitations of the application of a foreign law under the Rome Convention, although Norway is not a member state of European Union and the Convention and it will usually not apply directly to Norwegian law, the Convention still have an influence to Norwegian law system indirectly.[81]

---

[78] *Giuditta Cordero Moss*, op. cit., p. 103.

[79]Norwegian law on jurisdiction and choice of law in cases concerning personality rights, *Ingvill Helland*, Universitetet I Bergen, Det Juridiske Fakultet, 2007 p. 61 (See: Gaarder p.86).

[80] *Ingvill Helland*, op. cit., p.61.

[81] *Ingvill Helland*, op. cit., p.51.

With regard to the assignment of charterparty, as mentioned that the English law will, in practice, be chosen as the law governing the assignment of charterparty by the creditor even though the transaction may not have a connection with United Kingdom. As the Norwegian private international law in relation to the application of a foreign law can probably be found in the legislation itself, according to the Mortgage Act of 8 February 1980 (No.2), which applies to the assignment of charterparty in Norway, in § 1-2 "*Directory rules*", "*Effect of other laws"*, (1) states that "the rules of this Act may be set aside by the agreement exept as otherwise provided or appearing from the context...".

There is no restriction or limitation stipulated under the Mortgage Act which is a primary source of law in relation to the assignment of charterparty thus; it may be assumed that the English law may be applicable as selected by the parties.

However, the missing of the text with respect to the application of a foreign law in Norway in the Mortgage Act is not decisive. There are also other mandatory rules shall be taken into consideration. In the assignment of charterparty, the parties of the assignment must comply with the mandatory rules with regard to the creation and perfection of security and the enforcement of security.

#### 4.4.4.1 The creation and perfection of security[82]

As discussed in section 3.3.1 above that the assignment of charterparty, either the assignment or individual money claim or factoring, must comply and fulfil the requirements provided by the Mortgage Act, Chapter 4, in order to acquire the legal protection. These are mandatory rules that the parties cannot derogate from otherwise the assignment will not be legally bind between the assignor and the assignee and also between the assignee and the debtor.

[82]Cross Border Finance Handbook 2006, *Sindre Walderhaug and Roar Cordes Nilsson*, Simonsen Advokatfirma DA har bidratt i [have contributed in] PLCs.

#### 4.4.4.2 The enforcement of security

When it comes to the enforcement of security in Norway, it will always be subject to the mandatory rules of *"The Norwegian Enforcement Act of 26 June 1992 No. 86."*[83] The Enforcement Act provides the procedure and the methods for the claimant to enforce the claim or security. The enforcement will normally be taken by the execution and enforcement authorities. Since the Enforcement Act is mandatory hence an alternative enforcement under a foreign law will not be recognised or applied by the Norwegian courts. Nonetheless, there are exceptions which the assistance of those authorities is not required including the assignment of money claim and factoring. In this case the creditor has the same rights as the borrower in order to dispose the claim and is able to collect the claim when it is due, unless it is agreed otherwise.[84] This means the assignment of charterparty is not strictly fallen into the mandatory rules under the Enforcement Act because the Act leaves the enforcement action to the secured creditor to dispose the claim according to the contract which the claim is based.

The assignment of charterparty which is governed by English law may have some impacts by the Norwegian mandatory rules, especially, the Mortgage Act in relation to the creation and perfection of the assignment.[85] The problem shall not be arisen in the case of individual money claim because the requirement under this rule is the notice must be given to the debtor[86], which is also required under English law.[87] The assignment fulfilled the requirement of English law, therefore, shall be deemed perfected under Norwegian law as well. Then the choice of English law as the law governing the assignment should be applicable in the Norwegian court. Nevertheless, the application of English law may not be possible in the case of factoring because the Mortgage Act with regard to factoring requires that the factoring agreement has to be registered at the moveable property register in

---

[83] *Stephenson Harwood*, op. cit., p. 203.

[84] *Sindre Walderhaug and Roar Cordes Nilsson*, op. cit.

[85] Ibid.

[86] The Mortgage Act ("Lov om pant") of 8 February 1980 (no. 2), § 4-5, Norway.

[87] The Law of Property Act 1925, Section 136, UK.

Norway.[88] If the assignment has been concluded and fulfilled the requirements under English law, it is impossible that the choice of English law shall be applicable in the Norwegian court in the case of factoring because the assignment is not perfected under Norwegian mandatory rules.

The choice of English law as the governing law of the assignment of charterparty, in so far, is likely to be applicable only in the case of individual money claim under Norwegian law. Furthermore, the rights of the creditor under the assignment given under both law systems are different as discussed in Chapter 3. Under Norwegian law, the creditor may only dispose the assignment of receivables of the charterparty to the extent which is necessary to cover the outstanding debt which the charterparty is assigned to secure, however, under English there is another different right given to the assignee which is the power to give a good discharge without involving the assignor. The right of the assignee against the debtor shall be deemed as a significant matter. Therefore, the application of English law in the Norwegian court is more likely to be applicable to the extent only if it is not beyond what the law of the forum, Norway, gives the rights to the assignor. The assignor under the assignment of charterparty governed by English law shall be entitled only the receivables of the assignee obtained from the charterparty.

### 4.4.5 UN Convention on the Assignment of Receivables in International Trade, 2001

The problem of the application of foreign law in other jurisdiction in relation to the assignment of charterparty, although it is not a significant problem in practice but it may potentially cause a problem in particular to the creditor whether he will gain the rights as he intended when the assignment has been concluded. In the international level, there is an attempt to solve problems in particular for the assignment of receivables in international trade which the assignment of charterparty, especially for the receivables only, should be subject to fall in the definition and scope of this, so called, "*the 2001 United Nations*

[88] The Mortgage Act, Norway, op. cit., § 4-10.

*Convention on the Assignment of Receivables in International Trade"*. The Convention was prepared by the UNCITRAL Working Group on International Contract Practices and it was adopted and opened of signature in December 2001. In order to enter into enforce, the Convention requires five ratifications. However, there is only one ratification which is Liberia ratified on 16 September 2005. In addition, there are three signatory states which are Luxembourg in 2002, Madagascar and the United States of America in 2003.

According to the explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Assignment of Receivables in International Trade, the objective of the Convention is "to promote the availability of capital and credit at more affordable rates" in cross-border transactions involving the assignments of receivables. In order to achieve this objective, the Convention tries to reduce the legal uncertainty in accordance with the numbers of issues arising of the receivables in financing transactions. The Convention removes contractual limitations to the assignment of trade receivables, clarifies the effect of an assignment on rights securing payment of the assigned receivables. Moreover, the Conventions also provides a set of mandatory rules applicable in the case that an agreement between the parties is absent and addresses legal barriers to the collection of receivables from foreign debtors by providing a uniform set of rules in relation to debtor matter.

Another important solution, the Convention removes the existing uncertainty in relation to the law applicable to conflicts between an assignee and other claimants, for example, another assignee, creditors of the assignor or the administrator in the insolvency of the assignor, in order to determine who is entitled to receive the payment. Additionally, the Convention includes a set of conflict-of-laws rules. The laws with respect to the assignment of receivables may be different in each country. Although there are a number of treaties which deal with choice of law matter, those treaties are often deal with a specific transaction and only between the parties without dealing with the matter to determine the interest of third party. Furthermore, the domestic law of each country regulates the perfection and priority of the assignment of receivables differently and also there is no

uniformity in this matter, thus a problem may be arisen when there is a dispute brought to the court of another country.

Although the United Nations Convention on the Assignment of Receivables in International Trade 2001 is not yet entered into force[89] because the requirement of the ratification has not been met yet, the parties of the assignment of charterparty, especially the creditor should consider the problems which address in the Convention and the solutions it provided to be a guideline in order to select the law governing the assignment.

[89] Updated status can be checked at www.uncitral.org.

## 5 Conclusions

In shipping finance, the charterparty is considered as the important source of income of the shipowner which the creditor will normally take it to be as a security to secure the debt of the shipowner. There are several factors that the creditor shall take into their consideration in order to obtain the most benefit from the charterparty when the debt of the shipowner is in the event of default. The starting point is to look at the categories of charterparty. There are 3 categories of charterparty commonly in the shipping industry which provides the different benefit to the creditor, in particular, the length of the charterparty. The voyage charterparty may be the least interesting source of income for the creditor because it will receive the charter freight per voyage and apparently the period of voyage charterparty is considered short comparing to the time charterparty and bareboat charterparty. The time charterparty and bareboat charterparty are long term charterparty in its nature therefore it will ensure that the creditor will receive a sufficient benefit from the charter hire in order to recover the debt of the shipowner. However, this matter may be solved if the voyage charterparty is concluded as a consecutive voyage charterparty which will prolong the period of charterparty which is worth to take as a security.

Secondly, the creation and perfection of the assignment of charterparty is significantly important. In order to acquire the legal protection over the assignment of charterparty, the assignment has to fulfil all the requirements in compliance with the law governing the assignment. The regulation with respect to the assignment is usually mandatory in every country. If the parties to the assignment fail to satisfy the requirements according to the regulation, the assignment of charterparty will be invalid and not protected by the law, then, the creditor is not be able to enforce the assignment.

Finally, the choice of law to govern the assignment of charterparty is the factor which the creditor may be unaware of its effect to the assignment of charterparty when it comes to

enforcement. The creditor will definitely select the law which will give him the most advantage over the assignment and in practice; English law is the most desirable law to govern the assignment of charterparty by the creditor. Nonetheless, the choice of law in the assignment is not decisive and guaranteed whether the creditor will obtain the benefit as he expects. In particular when the dispute is brought before the court of the country other than the country of the governing law, the law of the forum may establish an obstacle to the enforcement under a foreign law. The mandatory rules of the forum and public policy lies beneath the legal system and the society of the forum are considerably potential impact to the law governing of the assignment whether it will be fully effective.

Generally, the assignment of charterparty concerns more than one country thus the law of the counties where the assignment of charterparty is connected should be taken into consideration, especially the place of assignor and the debtor as well as the place of the law governing the charterparty itself. In addition, there is no uniformity of the regulation governing the assignment although there are the attempts to find a solution for this matter through the international conventions; The Rome Convention on the Law Applicable to Contractual Obligations 1980 and UN Convention on the Assignment of Receivables in International Trade, 2001. The regulations governing the assignment of charterparty are still different and vary from country to country. In order to avoid an uncertainty and unexpected effect of the choice of law, before the assignment of charterparty is concluded, the creditor shall prudently select the law to govern the assignment of charterparty by consulting with the professional lawyer in each of those countries connected to the assignment for the applicability of a foreign law and use the solutions in accordance with those Conventions as a guideline in the selection.

## References

American Bar Association, adopted by The House of Delegates, *"RESOLVED, that the American Bar Association recommends that the United States sign and ratify the United Nations Convention on the Assignment of Receivables in International Trade."*, February 4-5, 2002

Bowtle, Graeme and Kevin McGuinness, *The Law of Ship Mortgages*, Lloyd's Shipping Law Library, 2001

Brækhus, Sjur, Sjørett, *Voldgift og Lovvalg Artikler 1979-1998, Choice of Law Problems in International Shipping (Recent Developments)*, Universitetsforlaget AS 1998

Cordero Moss, Giuditta, *Lecture on International Commercial Law*, Institutt for privatrett, Nr. 162, Universitetet i Oslo, 2003

Ellinger, E.P., E. Lomnicka and R.J.A. Hooley, *Ellinger's Modern Banking Law*, Fourth Edition, Oxford University Press, 2006

Falkanger, Thor, Hans Jacob Bull and Lasse Brautaset, *Scandinavian Maritime Law, the Norwegian Perspective*, Second Edition, Universitetsforlaget, 2004

Goode, Roy, *Commercial Law*, Third Edition, LexisNexis UK, 2004

Goode, Roy, *Goode on Legal Problems of Credit and Security*, Forth Edition, edited by Louise Gullifer, Sweet & Maxwell, Thomson Reuters, 2008

Goode, Roy, Herbert Kronke, Ewan McKendrick and Consultant on International Commercial Law and Practice: Jeffrey Wool, *Transnational Commercial Law, Text, Cases, and Materials*, Oxford University Press, 2007

Jackson, D.C., *Enforcement of Maritime Claims*, [Chapter 26], Application of Foreign Law, 4th Edition, 2005

Harwood, Stephenson, *Shipping Finance*, Third Edition, Euromoney Books, 2006

Helland, Ingvill, *Norwegian law on jurisdiction and choice of law in cases concerning personality rights*, Universitetet i Bergen, Det Juridiske Fakultet, 2007

Hertwig Eidsheim, Linn and Marie Efpraxiadis, *Assignment of Contractual Rights-Legal and Lingual Challenges*, Wikborg Rein's Shipping Update 1/2007

Maruno, Yo, *Practice and Law of International Ship Finance*, University of Southampton, Faculty of Law, 1979

Meeson, Nigel, *Ship and Aircraft Mortgages*, Lloyd's of London Press Ltd., 1989

Musæus, Lars and Walderhaug, Sinde, Simonsen & Musæus, *Norwegian Ship Finance: Ownership and Security, A Legal Guide to Ship Finance (a supplement to Asset Finance & Leasing Digest)*, [exact year is unknown, 199?]

O'Donovan, James and John Phillips, *The Modern Contract of Guarantee*, English Edition, Thomson Sweet & Maxwell, London, 2003

Ooi, Maisie, *Shares and Other Securities in The Conflict of Laws*, Oxford University Press, 2003

Sandberg, Jørgen W., the government authorized translator, *The English translation of Norwegian Mortgage Act of 8 February 1980 (No. 2)*

Walderhaug, Sindre and Cordes Nilsson, Roar, Simonsen Advokatfirma DA har bidratt i PLCs, *Cross Border Finance Handbook 2006*

Wiersholm, Mellbye & Bech, advokatfirma AS, *Doing Business in Norway*, October 2005

Wood, Philip R., *Comparative Law of Security Interest and Title Finance*, Second Edition, Thomson Sweet & Maxwell, London, 2007

**Commentary**

Skoghøy, Jens Edvin A., *Norsk Lovkommentar, Lover og kommentarer, L08.02.1980 nr.2 Panteloven* (The Norwegian Mortgage Act)

**List of Judgements/Decisions**

*Bank of Liverpool & Martins Ltd v. Holland* (1926) 43 T.L.R. 29 (K.B.) *per* Wright, J.
*Burlinson v. Hall* (1884) 12 Q.B.D. 347
*Coady v J Lewis & Sons Ltd* [1951] 3 D.L.R. 845
*Earl of Lucan, Hardinge v. Cobden* (1890) 45 Ch. D. 470
*Hughes v. Pump House Hotel Co. Ltd* [1902] 2 K.B. 190 (C.A.) *per* Cozens-Hardy L.J.
*James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 (H.L.) *per* Lord Reid
*Manufacturing Co Pty Ltd v Senes* [1964] N.S.W.R. 692
*Mercantile Bank of London v. Evans* [1899] 2 QB 613
*Raiffeison Zentralbank Osterreich AG v Fire Star General Trading LLC and others* [2001] 3 All ER 257
*Tancred v. Delagoa Bay and East Africa Rly Co.* (1889) 23 Q.B.D. 239
*Tzortzis v. Monark Line A/B* [1968] 1 W.L.R. 406 (C.A.) *per* Lord Denning, M.R.
*Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277(p.C.) *per* Lord Wright.

*XL Insurance Ltd v. Owens Corning* [2000] 2 Lloyds Rep. 500 (Q.B. Com. Ct).

**Treaties/Statutes**

*England*

The Law of Property Act 1925

*Norway*

The Enforcement Act of 26 June 1992 No.86

The Mortgage Act ("Lov om pant") of 8 February 1980 (N0.2)

The Norwegian Maritime Code of 24 June 1994 no. 39

The Norwegian Marine Insurance Plan of 1996

*Convention*

The Rome Convention on the Law Applicable to Contractual Obligations 1980

UNIDROIT Principles of International Commercial Contracts 2004

United Nations Convention on the Assignment of Receivables in International Trade, United Nations, 2001

**Internet**

www.uncitral.org [as of 26 August 2009]

http://treaties.un.org/Pages/Home.aspx?lang=en [as of 26 August 2009]

**Other sources**

*Damm, Wilhelm*, Partner, SCHJØDT, Oslo, Norway

*Lindblom, Fredrik*, Partner/Lawyer, Advokatfirma DLA Piper Norway DA, Oslo, Norway

*Mørkve, Camilla Skøie,* Senior Lawyer, SCHJØDT, Oslo, Norway

*Nedrelo, Geir*, Transportation – Scandinavia, Energy, Commodities & Transportation, FORTIS, Oslo, Norway

*P. Flaate, Bjørn*, Oil & Gas Services – Scandinavia, Energy, Commodities & Transportation, FORTIS, Oslo, Norway

*Sjøqvist, Richard*, Saksansvarlig advokat/Attorney in charge, BUGGE, ARENTZ-HANSEN & RASMUSSEN, Oslo, Norway